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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., et al.,
Petitioners,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, et al.,
Respondents.

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

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The oppositions of the Kentucky Public Service Commission ("PSC") and Air Products and Chemical, Inc. *et al.* ("Air Products") confirm the need for Supreme Court review in this case. Indeed, their own arguments and other intervening developments vividly illustrate why it is vitally important that review of the federal abstention questions not again be evaded, only to have the questions repeated in the future. Respondents point to no case—and there is none—that will present the issues better, and any further delay in resolving the conceded eight-circuit conflict will be harmful to the nation's electric utilities, their consumers, state regulators, and FERC. This Court should now decide whether federal courts have the authority to prevent state regulatory action that interferes with federal rights under the Federal Power Act.

1. Foremost, the oppositions do not dispute that the Sixth Circuit's decision in this case squarely conflicts with decisions of at least five other circuits. They do not dispute, and cannot

dispute, that litigation of these abstention questions has exploded, and that the pervasive conflicts have arisen, in just the past three years, with new cases and abstention disputes arising constantly. The questions will generate more and more litigation and recur in many future cases between these and other parties unless they are resolved by this Court now.

Indeed, one intervening development dramatically underscores the paramount need for a decision by this Court. Since the Petition was filed, the Fifth Circuit, *sua sponte,* overruled an earlier holding that abstention is improper,[1] withdrew its opinion in a second Fifth Circuit decision that so held,[2] and issued an amended opinion in the second case. It now holds that both *Younger* v. *Harris,* 401 U.S. 37 (1971), and *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943), require federal courts to abstain from deciding whether a state utility commission's refusal to give effect to the governing FERC rate schedules in setting retail rates violates the Federal Power Act or the Commerce Clause. *See New Orleans Public Service, Inc.* v. *New Orleans,* No. 85-3654, slip op. at 2-13 (5th Cir. Sept. 2, 1986). That the Fifth Circuit would, on its own motion, overrule settled law in that Circuit and destroy reliance interests of parties (after they reached a tentative settlement) is vivid testimony to the confusion in the lower courts and the extraordinary need for a decision by this Court that will resolve what now is a five to three split in the Circuits.

Respondents, however, suggest that review is not important because the Sixth Circuit did not publish its opinion and it thus has "little precedential value." PSC, p. 8. This suggestion is ironic because the Fifth Circuit relied extensively on this unpublished opinion of the Sixth Circuit in reversing its earlier

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[1] *South Central Bell Telephone Co.* v. *Louisiana Pub. Serv. Comm'n,* 744 F.2d 1107, 1123 (5th Cir. 1984), *vacated on other grounds,* 106 S.Ct. 2884 (1986).

[2] *New Orleans Public Service, Inc.* v. *New Orleans,* 782 F.2d 1236, 1243 (5th Cir. 1986).

decision and holding that both *Burford* and *Younger* require abstention. *See New Orleans Public Service, Inc.* v. *New Orleans,* No. 85-3654, slip op. at 8-10 & nn.1&2 (5th Cir. Sept. 2, 1986). In any event, one court of appeals manifestly cannot prevent review of decisions that create conflicts by refusing to publish its opinion. This is especially so here when *eight* circuits are involved in the conflict, the questions recur constantly, and there are now inconsistent decisions and growing uncertainty even within circuits that previously decided the questions.

2. Respondents also argue (PSC, pp. 4, 6-7) that review is inappropriate because one of the petitioners (Kentucky Power) sought review of the Kentucky PSC order in the "special" Kentucky "court" that is "designated" to participate in "public utility regulation." But review cannot be evaded on this basis.[3]

To the contrary, the very question presented here is whether the pendency of state ratemaking proceedings in state utility commissions and courts can prevent federal courts from enforcing federal rights and protecting the federal regulatory scheme under the Federal Power Act. Indeed, to avoid review on the basis of pending state court proceedings would be peculiarly inappropriate because the *only* reason that any state court proceeding was instituted here is that there was such uncertainty over whether abstention principles would prevent litigation of petitioners' Federal Power Act and Commerce Clause claims in federal court.[4] For this reason, simultaneous state court review proceedings are instituted in virtually every such Federal Power Act case in which abstention is threatened

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[3] Because there were "proceedings of substance on the merits" in this federal suit before the state petition was filed, this claim is especially meritless. *Compare Hicks* v. *Miranda,* 422 U.S. 332, 349 (1975), *with* Petition for Writ of Certiorari ("Pet.") p. 7 & n.5.

[4] *Compare* Pet. p. 7 n.5, *with Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 791 F.2d 1111, 1117 (3d Cir. 1986).

or ordered.[5] In short, the fact that simultaneous state proceedings are occurring—and that there have been intervening or other decisions in them[6]—cannot be a reason for this Court to deny review. If it were, these important and recurring questions would perpetually evade Supreme Court review.

3. Finally, respondents argue that the fact that FERC has again reasserted its exclusive jurisdiction over these interstate arrangements, in its August 20, 1986 Orders (PSC, pp. 7a-27a), means that the case is "in all practical terms . . . moot." PSC, p. 8. This is nonsense. The recent FERC orders underscore that the confusion and conflicting abstention decisions are threat-

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[5] *See, e.g., Aluminum Company of America* v. *Utilities Comm'n of North Carolina,* 713 F.2d 1024 (4th Cir. 1983), *cert. denied,* 465 U.S. 1052 (1984); *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 791 F.2d 1111 (3d Cir. 1986).

[6] In this regard, respondents' arguments (PSC, p. 7; Air Products, pp. 11-15) that review is inappropriate because the Kentucky Public Service Commission and the specialized Kentucky court have issued various "final decisions" construing the FERC rate schedules and that these decisions are allegedly *res judicata* in the FERC and federal court proceedings are startling. The substantive issue in this federal case is *whether* states can so invade FERC's jurisdiction or whether, in contrast, the Kentucky PSC is required by the Federal Power Act and the Commerce Clause to give effect to the Unit Power Agreement and the Transmission Agreement in its retail rate orders, *pending* a final decision by FERC. Not only are the decisions cited by the PSC (p. 7) inapposite—as even the PSC suggests (pp. 7-8)—but the question of the *res judicata* effect of the state agency's and specialized court's ratemaking determinations (which are "legislative" in character) could not even be raised until the threshold abstention issues are decided.

Finally, even if it were clear that *res judicata* could be a defense here, principles of mootness would not prevent review of the abstention questions in this case. These questions have recurred, and will recur, between these and other parties. Because intervening state utility or judicial ratemaking determinations will inevitably occur before these abstention questions can reach this Court, they will always evade review if they are not decided now.

ening the interstate power system and the regulatory scheme of the Federal Power Act and demonstrate that a national decision by this Court is urgently needed now.

The overriding fact is that the two FERC rate schedules that the PSC ignored—the Unit Power Agreement and the Transmission Agreement—are both indisputably "filed rates." Petitioner's substantive federal claim in this case is identical to the claim raised in *Nantahala Power & Light Co.* v. *Thornburg,* 54 U.S.L.W. 4676 (June 17, 1986): that the Kentucky PSC was obligated, from the date that these rate schedules became effective, to include all the resulting costs in Kentucky Power's retail revenue requirements and rates, subject to *future* refund only in the event that FERC *thereafter* decided that these "filed rates" were not just and reasonable.[7] Because the federal court abstained, however, the Kentucky ratemaking authorities have been able (on what petitioners regard as patently frivolous grounds which FERC has now rejected[8]) to exclude over $47 million from Kentucky Power's rates and revenues over the past two years—with the amount of the "trapped costs" increasing by over $64 thousand each day. The question presented here is whether utilities have a federal court remedy to prevent state ratemaking authorities from delaying rate increases until FERC exercises its jurisdiction and affirmatively rejects the state's objections—and to assure that state agencies do not thereby

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[7] *See also Narragansett Elec. Co.* v. *Burke,* 119 R.I. 559, 381 A.2d 1358, 1363 (1977), *cert. denied,* 435 U.S. 972 (1978).

[8] The Kentucky authorities previously justified their actions by claiming that this is a case like *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n.,* 77 Pa. Commw. 268, 273-74, 465 A.2d 735, 737-38 (1983). *See* PSC, pp. 3-4; Air Products, pp. 10-11. There, the state commission order was affirmed on the ground that it did not reallocate power supplies and their costs between different states, but merely ruled on the local company's "prudence" in purchasing power from an affiliate rather than cheaper power from

(Footnote continued on following page)

stand the filed rate doctrine and the federal regulatory scheme on its head.[9] The fact that FERC is now conducting proceedings cannot prevent review of *this* federal claim even if one assumes that the Kentucky authorities will hereafter obey an explicit FERC order rejecting the state's position (*but see Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. 4676 (June 17, 1986)). If these federal claims could be so easily mooted, their repetition and continued evasion of review would be not only possible, but inevitable, and the implementation of the principles of *Nantahala* would be impeded.

(Footnote continued from preceding page)

a nonaffiliate. Whether states have even this authority is a substantial federal question that federal courts must ultimately decide. *Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. 4676, 4681 (June 17, 1986) (reserving decision on this issue).

However, here, there is no cheaper power outside the American Electric Power Pool and the issue is how the costs of its power should be allocated among utilities in different states. The states are preempted from making this determination generally (*see Nantahala Power & Light Co., supra*, 54 U.S.L.W. at 4681-82). Ironically, the PSC and Air Products defend the PSC's actions by claiming (erroneously) that FERC previously disclaimed jurisdiction over "prudence" issues and authorized inconsistent state regulation. PSC, pp. 3-4, 6; Air Products, pp. 2, 6, 10-11. However, the PSC and Air Products ignore that FERC's August 20, 1986 Orders clarified any arguable ambiguity in FERC's earlier orders and flatly rejected the PSC's position.

[9] Thus, the arguments of Air Products (p. i) that "there was not a colorable preemption claim at the time of the federal district court decision" is a curious one. The preemption claim here is identical to that which this Court unanimously accepted in *Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. 4676 (June 17, 1986). *See* p. 5 & n.8, *supra*.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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